IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No.....

JACK SCHNEIDER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The matter involved is of outstanding public interest.

We respectfully submit that this is not the ordinary case of an individual convicted of crime, which usually involves merely the question whether justice had been done to an individual in a particular case. There is no claim here that either the judge presiding at petitioner's trial or the jury which passed upon his guilt were animated by a feeling of hostility towards petitioner personally. Nor does this case involve an ordinary labor dispute, in the sense that petitioner is merely the victim of class prejudice either on the part of the judge or the jury because of the fact that he was on the wrong side of a labor dispute from their point of view. *That* is, indeed,

involved in this case; and petitioner does claim that the fact that the case grew out of a labor dispute, or that a labor dispute was involved therein, was the basis of his conviction. But petitioner claims further that his conviction is due to the fact that the labor dispute in which he was involved was complicated by special circumstances and that *the state court therefore applied a special kind of law to him,* which deprived him of both due process of law and the equal protection of the laws guaranteed by the United States Constitution.

But while petitioner was the victim of a special kind of labor dispute, his case is not an *isolated* one. On the contrary, it is becoming more and more prevalent, and the petition to this Court for a writ of certiorari is based on the belief that, unless this Court steps in by enforcing the paramount provisions of the Federal Constitution, the kind of justice meted out to this petitioner and the kind of law applied in his case may become prevalent in our state courts, and possibly in our courts generally. It is petitioner's claim that he is the victim of a movement to apply a different kind of law to *radical* labor leaders than to ordinary labor leaders, complicated by a movement against so-called undesirable aliens,—the *radical* alien labor leader being the *undesirable alien par excellence.* This movement has, unfortunately, become widespread and has had various manifestations. One of these manifestations was the persistent effort to deport Harry Bridges, the well known Pacific Coast C. I. O. leader, which culminated in an attempt to pass a special Act of Congress to deport him, when it was found that he could not be deported under existing law. Another manifestation of this movement is the present case,—except that, unfortunately, the enforcement of the ordinary legal processes was in different hands from those which handled the Bridges case. It is this that gives the matter its public importance: Petitioner claims that a special kind of law was deliberately applied to him in the court in which he was tried, not only for the purpose of convicting him of

crimes of which he was clearly not guilty, but primarily for the purpose of finding a means of deporting him as an allegedly undesirable alien.

And we respectfully submit that an examination of the record of the trial will conclusively prove this claim to be true. This is shown by the first two questions put by the trial judge to petitioner as recited in the foregoing petition. But those two questions are merely illustrative of what went on throughout the trial, and particularly throughout the cross-examination of petitioner and his chief alibi witness, Michael Quill. This is also shown by the lengthy cross-examination as to the manner in which petitioner came to this country, followed by the charge that petitioner was illegally in this country,—*a charge which both the Court and prosecutor knew to be unfounded* (fols. 2479-2493). And it is shown again by the summation of the prosecuting attorney, in which he specifically told the jury that the *Alien Squad* of the New York Police Department had particular reason for watching the petitioner (fol. 2802). But these are not the only places in which that was shown. If this Court takes jurisdiction, we expect to show by other portions of the record that this was the basic reason for the state court's application of a different rule of law to petitioner from that which the same court applied to other persons charged with crime under the laws of the State of New York.

Unless, therefore, this Court steps in and tells the state courts that the alien within our gates is entitled to the equal protection of the laws, and that a radical labor leader is entitled to be tried under the same laws and with the application of the same legal principles as any other person, and that even a combination of the two, that of being both an alien and a radical labor leader, does not deprive a man of his constitutional rights, there is grave danger that we may have two classes of law,—*two standards for measuring the guilt of persons charged with crime*,—one applicable to ordinary citizens, and another applicable to alleged undesirable aliens.

POINT II

The contention that petitioner's constitutional rights have been invaded is based on the entire record and not exclusively on any particular portion.

We desire to make it clear that our contention of lack of due process is based on the entire record. While certain aspects of the case would be sufficient to warrant a review by this Court even if they stood alone, because of the invasion of constitutional guarantees which each discloses, petitioner's application is based on the record as a whole,—the cumulative effect of the various aspects of the case which resulted in a complete deprivation of due process and of the equal protection of the laws. Because of this, it is only possible in this preliminary brief to indicate the points involved, so as to show the nature of the points involved and the kind of argument we seek to present if leave to appeal is granted,—leaving the argument itself to abide that event.

The nature of the points involved can best be stated by pointing to those points made by us in the state courts which we believe raise federal questions. The first of these points, raised both in the Appellate Division and the Court of Appeals, is *that petitioner was convicted of a crime for which he was not tried and with which he was not charged.* That, we respectfully submit, clearly raises a federal question,—the question of due process under the Fourteenth Amendment. Whether or not our contention is correct is, of course, a question which can only be determined after a reading of the full record. There are, really, two questions here: one, as to whether petitioner was *tried* for coercion; and the other, whether the *coercion* of which he was convicted is the same as that with which he was charged in the indictment.

The first is a comparatively simple question, and the new facts which it involves are stated in the petition.

But their *verification* requires a reading of the entire record. The second question is a more complicated one, and requires a rather elaborate argument as to the *meaning* of the facts disclosed by the record,—and the soundness of which can only be tested by a reading of the entire record.

The real question in a case like the present one is whether the actual trial,—i. e., what took place before the jury between the reading of the indictment and the rendition of the verdict,—amounted to a trial of the charge mentioned in the indictment, and whether that trial was conducted in accordance with the requirements of due process. The second basic question therefore relates to the *conduct* of the trial; and that, of course, can only be determined by a reading of the entire record.

Summarizing our argument in the state court, in so far as it related to the constitutional questions we seek to argue in this Court, it may be stated as follows:

(a) That petitioner was convicted of a crime for which he was not tried.

(b) That the coercion of which he was nominally convicted is not the coercion charged in the indictment.

(c) That he was really tried and convicted of *something* which was not mentioned in the indictment and which was not a crime under the laws of the State of New York,—namely, that of being a radical labor leader and therefore an undesirable alien.

(d) That because of the nature of the "offense" for which he was actually tried, the trial was conducted under what may be called a "suspension of the rules"; that is, a suspension of the constitutional safeguards which apply to the conduct of criminal cases, so as to permit the jury to find petitioner guilty of some crime in order that punishment might be inflicted,—and particularly with the view to obtaining "a punishment that would fit the crime" of

being an undesirable alien, namely, his deportation from this country.

(e) That the suspension of the rules which prevailed throughout the trial continued in the Court's charge to the jury, in which the jury were instructed that in passing upon the credibility of any witness they may take into consideration the *religious, social and political views* and affiliations of the witness.

A few words of amplification should be said in connection with the point referred to under (b). As already stated, it is our contention that the charge of coercion of which petitioner was found guilty *was not the same coercion* as that with which he was charged in the indictment. The record shows that the charge of coercion was based on the assault with which he was charged in the same indictment. The prosecutor expressly so stated to the jury in his opening (73-75). *But the jury acquitted him of the assault, and therefore of the coercion based on that alleged assault.*

But in its charge to the jury, after the case was closed, the Court injected *a new charge*, not stated in the indictment nor tried,—namely, a charge of coercion based on the occurrences of April 6 (fol. 3847). It is our contention that the injection, *after the trial*, of a new *factual basis* for the charge of coercion made in the indictment was a clear violation of due process. But this new and different charge of coercion also lacked any actual basis of fact in the evidence. And it is our contention that *an utter lack of evidence* raises a question of law, and when the law amounts to a constitutional guarantee it raises a question reviewable by this Court.

A few words should also be said in amplification of our contention under (a). It is our contention that whichever claim is made on behalf of the State of New York as to the basis of petitioner's conviction, there was a lack of due process because of the fact that the Court did not

permit counsel for petitioner to open to the jury with respect to the charge of coercion. This, too, has a double aspect: It is our contention that the refusal to permit counsel for petitioner to open to the jury on the count charging coercion is in itself a denial of due process. In addition to that, the form in which the Court put its ruling, and the subsequent course of the trial while the prosecution was putting in its case, of necessity led counsel for petitioner to assume that the charge of coercion would not be pressed, and they were thereby prevented from putting in any evidence that they might have put in had the Court not misled them into believing that the charge of coercion was out of the case. Under those circumstances it was clearly a deprivation of due process to pick up the charge of coercion again after the case had been closed, and to permit the jury to find a verdict of guilty on the basis of either the occurrences of April 8 or April 6. This was particularly improper as to the occurrences of April 6,—quite aside from the question that it was not the charge made in the indictment,—since at no time during the course of the trial was it suggested that the evidence was being introduced in proof of the charge of coercion, and was adduced as evidence of the alleged conspiracy,— *the charge of coercion itself being expressly based by the prosecution on the alleged assault.* In view of the rulings of the Court and the express statements of the prosecuting attorney to the jury, *both in the opening and closing*, that the charge of coercion is based upon the charge of assault, counsel for the defense had a right to expect that if they disproved the assault that would disprove the coercion. Under the circumstances a conviction for coercion based on something different than the assault which was expressly laid as the basis of the charge of coercion is in effect to base the conviction on a charge that had *neither been made nor tried.*

We take it that there is no necessity to argue the point that if our contention be true that the record shows that petitioner was convicted of a crime with which he was not charged, or of a crime with which he was charged but

for which he was not tried, the resultant contention of lack of due process within the protection of the Fourteenth Amendment to the United States Constitution is well founded. We shall, therefore, not discuss the point any further. It may be argued, however, that the question of the refusal to permit petitioner's counsel to open to the jury on the coercion count was not within the protection of the United States Constitution. In anticipation of such argument we shall cite the following cases decided by this Court, which, we respectfully submit, clearly establish that due process of law under the United States Constitution includes representation by counsel, and not merely formal representation but *the right to argue both to the Court and the jury in accordance with the principles of the common law.*

Pennoyer v. *Neff*, 95 U. S. 714.
Cooke v. *United States*, 267 U. S. 517.
Powell v. *Alabama*, 287 U. S. 45.

POINT III

The objectionable features of the trial were duly excepted to, and the constitutional question duly raised in the state courts.

It remains to discuss briefly the question whether or not the questions sought to be reviewed were raised in the state courts in a manner to entitle the petitioner to the intervention of this Court. In this connection we respectfully submit that the applicable rule, as gathered from the decisions of this Court, does not require that petitioner, in order to be entitled to a review by this Court of the question whether or not his trial was in accordance with due process, must have specifically invoked the protection of the United States Constitution *in haec verba*. All that the rule requires is that the *question* sought to be considered by this Court should have been *raised* in the state

court. Not that that would make much difference in the present case,—for, concededly, the protection of the Federal Constitution was invoked in the state court, in so many words, with respect to the due process clause as well as to the equal protection of the laws clause of the Fourteenth Amendment. The amended remittitur contains a specific certification of that fact. It says:

> "this Court having overruled the contention of the appellant that his trial and conviction were in violation of the due process clause and the equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States."

There can therefore be no question but that the protection of the United States Constitution was duly invoked by petitioner and denied by the state court. The question may, however, possibly become material on the question as to whether or not all of the questions sought to be raised by us may be reviewed by this Court, and particularly whether the question of the Court's charge to the jury in the paragraph quoted in the petition may be reviewed by this Court, in view of the statement in the amended remittitur, following the language quoted above:

> "and having refused to pass upon the effect of any parts of the charge to which no exceptions were taken."

In this connection, we respectfully submit, in the first place, that that is a question that should be argued on the appeal itself and not on the application for permission to appeal by writ of certiorari. In the second place, we respectfully submit, that the question whether certain state procedural requirements will stand in the way of a review by this Court of a judgment attacked for lack of due process is itself a Federal question. And that question, we respectfully submit, should also be argued on the main appeal and not on this application. We desire to point out here, however, by way of preliminary argument, that the paragraph of the Court's charge quoted in the petition herein, which the Court of Appeals apparently had in mind

when it put into the amended remittitur the language last quoted therefrom, received its meaning from the course of the trial which had preceded the charge itself. *That procedure had been objected to, and duly excepted to, at every stage;* and the questions raised by the separate exceptions were presented again by the motion to dismiss at the end of the State's case as well as at the end of the entire case, and by the exceptions taken to the denial of those motions.

In this connection we respectfully call the attention of the Court to the fact that the dissenting judges of the New York Court of Appeals did not base their dissent on any *particular error,* but on the *cumulative effect of the errors committed during the trial as shown in the record.*

What Chief Judge Lehman and Associate Judge Loughran said in their very terse statement of reasons, really amounted to a statement that *petitioner did not have a fair trial,*—which, in turn, is merely another way of saying that the conviction was *in violation of due process of law.*

In this connection we respectfully call the attention of the Court to the fact that the Court of Appeals of the State of New York may not, under the provisions of the New York State Constitution, review any questions of fact, and is limited to the consideration of questions of law only. What the two dissenting judges, therefore, said, in effect, is that, leaving out the questions of weight of evidence, and examining the record purely from the point of view of due process of law,—that is to say, the application to this case of well settled rules of legal procedure applicable in criminal cases generally,—they had come to the conclusion that the trial is a whole did not meet the requirements of due process which are part of our general jurisprudence, and are therefore embodied in both the New York State and the Federal Constitutions. And this, again, is equivalent to saying that petitioner did not receive the equal protection of the laws which is guaranteed him by the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

This case is clearly one in which the public interest requires a full review by this Court. A *writ of certiorari* should, therefore, be granted, so as to bring this case before this Court for a full argument of the questions involved, so that this Court may pass upon the very serious and grave questions involved, and render judgment accordingly.

Dated, New York, February 20, 1941.

Respectfully submitted,

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